



U.S. Department of Justice

Executive Office for Immigration Review

Office of the General Counsel

5107 Leesburg Pike, Suite 2150
Falls Church, Virginia 22041

November 9, 2018

Via U.S. Mail

MuckRock News
DEPT MR 59775
411A Highland Ave.
Somerville, MA 02144-2516

Re: FOIA 2018-46881-R

Dear Mr. Hoppock:

This letter is a supplemental response to your Freedom of Information Act (FOIA) request to the Executive Office for Immigration Review (EOIR) dated August 21, 2018 in which you seek "the current dashboard for each of the immigration judges as of August 21, 2018." In light of your September 27, 2018 appeal to the Office of Information Policy (OIP), EOIR voluntarily agreed to reconsider your request and provide you with this supplemental response.

Agency records are records that are either created or obtained by an agency and under agency control at the time of the FOIA request. *See DOJ v. Tax Analysts*, 492 U.S. 136 (1989). For your information, the so-called "Performance Dashboard" represents a user-interface display to an underlying dynamic database management system. Because of its dynamic nature, the user-interface display has a maximum lifetime of the user's session. Once the user's session ends, the user-interface display is not retained unless the user specifically saves it by, for example, taking a screenshot of that moment in time of the user-interface display. As a general matter, EOIR does not maintain records such as those that you described in your request.

A corollary to the definition of an "agency record" as explained in *DOJ v. Tax Analyst* is that the FOIA statute does not require an agency to create a record in response to a FOIA request. Therefore, taking a "screenshot" of the "Performance Dashboard" for each individual immigration judge would require the agency to create a record in response to your request and we decline to undertake that endeavor.

Moreover, even assuming the agency undertook creating "screenshots" to satisfy your request, such screenshots would nonetheless be exempt from disclosure under 5 U.S.C. §

552(b)(6), which concerns material the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties. The "Performance Dashboard" is a measure of job performance in real time and multiple courts have found that federal employees have a privacy interest in their job performance evaluations. See, e.g., *Smith v. Dep't of Labor*, 798 F. Supp. 2d 274, 283-85 (D.D.C. 2011).

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist. See <http://www.justice.gov/oip/foiapost/2012foiapost9.html>.

You may contact our FOIA Public Liaison at the telephone number (703) 605-1297 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at (202) 741-5770; toll free at (877) 684-6448; or facsimile at (202) 741-5769.

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following web site <https://www.foiaonline.gov/foiaonline/action/public/home>. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

Joseph Schaaf

J.R. Schaaf
Chief Counsel for Administrative Law



U.S. Department of Justice

Executive Office for Immigration Review

Office of the General Counsel

5107 Leesburg Pike, Suite 2150
Falls Church, Virginia 22041

November 9, 2018

Via U.S. Mail

MuckRock News
DEPT MR 59775
411A Highland Ave.
Somerville, MA 02144-2516

Re: FOIA 2019-01000

Dear Mr. Hoppock:

This letter is in response to your Freedom of Information Act (FOIA) request to the Executive Office for Immigration Review (EOIR) dated October 4, 2018 in which you seek “a screenshot of each Immigration Judge’s performance dashboard as of today, October 4, 2018.”

Agency records are records that are either created or obtained by an agency and under agency control at the time of the FOIA request. *See DOJ v. Tax Analysts*, 492 U.S. 136 (1989). As we notified you in our supplemental response to FOIA 2018-46881-R to you dated November 9, 2018, the so-called “Performance Dashboard” represents a user-interface display to an underlying dynamic database management system. Because of its dynamic nature, the user-interface display has a maximum lifetime of the user’s session. Once the user’s session ends, the user-interface display is not retained unless the user specifically saves it by, for example, taking a screenshot of that moment in time of the user-interface display. As a general matter, EOIR does not maintain records such as those that you described in your request.

A corollary to the definition of an “agency record” as explained in *DOJ v. Tax Analyst* is that the FOIA statute does not require an agency to create a record in response to a FOIA request. Therefore, taking a “screenshot” of the “Performance Dashboard” for each individual immigration judge would require the agency to create a record in response to your request and we decline to undertake that endeavor.

Moreover, even assuming the agency undertook creating “screenshots” to satisfy your request, such screenshots would nonetheless be exempt from disclosure under 5 U.S.C. § 552(b)(6), which concerns material the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties. The “Performance Dashboard” is a measure of

job performance in real time and multiple courts have found that federal employees have a privacy interest in their job performance evaluations. See, e.g., *Smith v. Dep't of Labor*, 798 F. Supp. 2d 274, 283-85 (D.D.C. 2011).

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist. See <http://www.justice.gov/oip/foiapost/2012foiapost9.html>.

You may contact our FOIA Public Liaison at the telephone number (703) 605-1297 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at (202) 741-5770; toll free at (877) 684-6448; or facsimile at (202) 741-5769.

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following web site <https://www.foiaonline.gov/foiaonline/action/public/home>. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

Joseph Schaaf

J.R. Schaaf
Chief Counsel for Administrative Law